NO. _____

IN THE COURT OF APPEALS
FOR THE FIRST/FOURTEENTH JUDICIAL DISTRICT
AT HOUSTON, TEXAS

IN RE THE STATE OF TEXAS EX REL. BRIAN W. WICE, RELATOR.

ANCILLARY TO
STATE OF TEXAS V. WARREN KENNETH PAXTON, JR.
CAUSE NOS. 1555100, 1555101, 1555102

RELATOR'S PETITION FOR WRIT OF MANDAMUS

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THE STATE OF TEXAS

ORAL ARGUMENT REQUESTED

IDENTIFICATION OF THE PARTIES

Pursuant to Tex. R. App. P. 53.2 (a), the names and addresses of all interested parties are provided below so the members of this Honorable Court may determine whether they are disqualified to serve or should recuse themselves from participating in the decision of this case:

Named Relator and Lead Counsel for Relator:
Brian W. Wice
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Co-Relator:
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Respondent:
Honorable Robert Johnson
Judge of the 177th District Court of Harris County, Texas

Real Party in Interest-Criminal Defendant:
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TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

PAGE

CASES:

REASONS WHY THIS COURT SHOULD GRANT THIS PETITION

Like every one of the 450 district judges in Texas, Respondent has a ministerial duty to: (1) faithfully apply controlling case law announced by the courts of appeals, the Court of Criminal Appeals, and the United States Supreme Court; (2) rule on motions within a reasonable amount of time; and (3) promptly carry out an appellate court's mandate to take specific action after reacquiring plenary jurisdiction. Because this matter clearly reveals Respondent's failure to discharge each of these ministerial duties, extraordinary relief is warranted.

The underlying narrative of this case is driven by two long-running, hotly contested issues: (1) Ken Paxton's persistent efforts to return venue to Collin County where he enjoys the ultimate home-field advantage; and (2) Relator's unsuccessful attempts to compel Respondent to craft an order for payment of attorneys fees the Court of Criminal Appeals ordered a year ago. Respondent's rulings violated these clear ministerial duties.

The issues this matter requires this Court to decide are not about Democrats and Republicans but about right and wrong and Relator's right to a level playing field in a case where justice and politics intersect and

where politics seems to prevailing. This petition explains why this Court is positioned to, and should ultimately, keep that from happening.

STATEMENT REGARDING ORAL ARGUMENT

The critical issues this case presents: a trial court's ministerial duty to carry out an appellate court's mandate, application of law of the case, and error preservation in the context of an order of judicial appointment that had allegedly lapsed warrant oral argument under Tex. R. App. 39.1.

STATEMENT OF THE CASE

This is an original mandamus proceeding brought by Brian W. Wice, Collin County Criminal District Attorney Pro Tem ["Relator"]. Relator asks this Court to compel Robert Johnson, Presiding Judge of the 177th Criminal District Court of Harris County, Texas ["Respondent"] to: vacate his June 25, 2020 order in the three criminal cases pending against Real Party in Interest, Warren Kenneth Paxton, Jr. ["Paxton"], returning venue in these cases to Collin County;[1] comply with his ministerial duties to obey the Court of Criminal Appeals's mandate to "issue a new order for

[1] Tab 25. A Collin County grand jury indicted Paxton in July 2015 for two first-degree felonies of securities fraud and one third-degree felony of failing to register as an investment advisor representative as required by the State Securities Act.

payment of [attorneys] fees in accordance with a fee schedule that complies with Article 26.05(c)[2] of the Texas Code of Criminal Procedure,"[3] and rule on his motion for payment,[4] and Nicole DeBorde's unopposed motion to withdraw as an attorney pro tem[5] within a reasonable amount of time in the face of Relator's repeated requests for Respondent to do so.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

1. Relators are Appointed as Attorneys Pro Tem to Investigate Paxton

> In 2015, the Public Integrity Unit of the Texas Rangers forwarded a formal complaint against Kenneth Paxton to the Collin District Attorney's Office based upon alleged conduct that occurred before he took office as Attorney General. The Collin County Criminal District Attorney recused his office from all matters involving the cases, which were assigned to the 416th Judicial District Court. The Local Administrative

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[2] This provision provides in pertinent part that, "Each fee schedule adopted [by formal order of the district courts trying criminal cases in each county] shall state *reasonable* fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates..." (emphasis added).

[3] *In re State of Texas ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d 189, 200 (Tex.Crim.App. 2018)(orig. proc.). As recounted below, Relators were to be compensated at an hourly rate of $300 for their services. Relator advised Respondent and opposing counsel in a Zoom call on June 10, 2020 that he had agreed to accept $100 an hour for his work in 2016, an amount that the Collin County fee schedule paid for all non-capital felonies from March 1, 2017 until November 1, 2019. Tab 3 at 5.

[4] Tab 19.

[5] Tab 16.

> Judge of Collin County appointed three experienced criminal defense attorneys, Kent A. Schaffer, Brian W. Wice, and Nicole DeBorde, to serve as attorneys pro tem in those cases. The judge agreed to pay each attorney a fee of $300 per hour for his or her professional services.[6]

2. A Collin County Grand Jury Indicts Paxton on Three Felonies and the Dallas Court of Appeals Affirms the Denial of Paxton's Pre-Trial Writs

In July 2015, a Collin County grand jury indicted Paxton for three felonies: two counts of first-degree felony securities fraud and one count of third-degree failure to register as an investment advisor in the manner required by the State Securities Act.[7] Over the next seven and one-half months, Relator incurred considerable expenses and engaged in extensive work that included responding to over a dozen pre-trial writs and motions[8] filed by Paxton's 12-member legal team.[9] Judge George Gallagher, Judge of the 396th District Court of Tarrant County, was assigned to these cases

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[6] *In re State of Texas ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d at 191.

[7] Tab 25.

[8] *In re State of Texas ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d at 203 (Richardson, J., *concurring*).

[9] To pay for his extensive legal team, Paxton established a legal defense fund that has raised over $500,000. Andrea Zelinski, *Paxton grows defense fund*, www.chron.com (July 5, 2017). Tab 26.

when Judge Chris Oldner, Judge of the 416th District Court of Collin County, to whom these cases were originally assigned, recused himself.[10] The Dallas Court of Appeals affirmed Judge Gallagher's rulings denying Paxton's multiple requests for relief in his pre-trial writs, and the Court of Criminal Appeals denied discretionary review.[11]

3. Collin County's Protracted Battle to Deny Relators Attorneys Fees

> The trial court has twice ordered interim payment for the pre-trial legal services provided by the appointed prosecutors. On January 11, 2016, the Collin County Commissioners Court considered a trial court's order for interim payment of fees and expenses to the appointed prosecutors. The Commissioners Court was made aware, at the time, that the bill was significantly greater than the fee schedule allowed.[12] Nevertheless, the Commissioners Court voted to pay Relators $242,025 in attorneys fees for the pre-trial services already performed based upon the $300 per hour rate. This payment is not at issue in this case.
>
> Later, the other Real Party in Interest, Kenneth Paxton, filed a pre-trial motion challenging the interim fees for the appointed prosecutors. On January 4, 2017, the trial judge overruled the defendant's motion and issued a second payment

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[10] Tab 7 Exhibits A & B.

[11] *Ex parte Paxton*, 493 S.W.3d 292 (Tex.App. – Dallas 2016, pet. ref'd)(en banc).

[12] "At the time, the fee schedule set a fixed fee for pre-trial preparation with judicial discretion to adjust the fee upwards in an amount not to exceed an additional $1,000." *In re State of Texas ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d at 191 n. 4.

> of attorneys fees in the amount of $199,575. This time, however, the Commissioners Court rejected the request for compensation, choosing instead to file a writ of mandamus to compel the trial court to vacate the second payment order. The Fifth Court of Appeals in Dallas agreed with the Commissioners Court, granting mandamus relief and holding that the trial court lacked the authority to order the payment.[13] The appointed prosecutors have petitioned us to determine who got it right: the trial court or the court of appeals.[14]

On November 21, 2018, a majority[15] of the Court of Criminal Appeals concluded that the court of appeals – not the trial court – got it right:

> Here, the trial court exceeded its authority by issuing an order for payment of fees that is not in accordance with an approved fee schedule containing reasonable fixed rates or minimum and maximum hourly rates.[16] We, therefore, agree with the court of appeals that the Commissioners Court of Collin County is entitled to mandamus relief. *We vacate the trial*

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[13] *In re Collin Cty.*, 528 S.W.3d 807, 815 (Tex.App.– Dallas 2017, orig. proc.).

[14] *In re State of Texas ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d at 191-92 (footnotes omitted).

[15] Judge David Newell's majority opinion was joined by Presiding Judge Keller and Judges Keasler, Hervey, and Richardson. Judge Richardson filed a concurring opinion, Judge Yeary filed a concurring and dissenting opinion, and Judges Alcala, Keel, and Walker filed dissenting opinions. Judge Alcala's dissenting opinion described the result reached by the majority as "harsh," "unfair," and manifestly unjust." *Id.* at 208, 216, 220 (Alcala, J., *dissenting*).

[16] "Nothing in this Court's opinion should be read as announcing a 'one size fits all' scheme for payment of fees. *Trial judges in Texas can develop a wide array of payment structures to account for unforseen circumstances.* They simply must be based upon reasonable fixed rates or minimum and maximum hourly rates." *Id.* at 200 n. 67. (emphasis added).

court's second order for interim payment and order the trial court to issue a new order of payment of fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure.[17]

4. The Court of Criminal Appeals Denies Relator's Motion for Rehearing and Reinvests Respondent With Plenary Jurisdiction

Relator filed a motion for rehearing on December 27, 2018, arguing *inter alia*, that the majority opinion would pay him $9.93 an hour per Collin County's cap for his 2016 pre-trial work, an amount that could not possibly be the "reasonable fee" mandated by Tex. Code Crim. Proc. art. 26.05(b) & (c).[18] Relator also pointed out that Commissioners Court had threatened to file a claw back action against Relator "to recoup what it already paid ... for [his] work on the Paxton cases."[19] The court denied

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[17] *Id.* at 200. (emphasis added).

[18] Tab 17. This figure turned out to be wrong: the actual hourly rate would have been $3.13 based on the 320.75 hours Relator billed in 2016 weighed against Collin County's cap of $1,000 for all pre-trial work performed. Tab 23 at 8. n. 19. This amount would be $6.26 an hour based on the presumptive adjustment of $1,000 the fee schedule permitted. *See In re State of Texas ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d at 215 (Alcala, J., *dissenting*)(a payment comporting with the pre-trial cap is "an amount that no one can seriously contend is reasonable.").

[19] *In re State of Texas ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d at 203-04 (Richardson, J., *concurring*). Responding to this Draconian threat, Judge Richardson made a compelling legal argument that because "the first payment by the Commissioners Court was a clear ratification of the agreement to pay [the $300 an hour] requested for work already incurred, the Commissioners Court should not be entitled to recoup the fees already paid." *Id.* As recently as last December, Commissioners Court renewed their threat by sending Relator a demand letter in which

Relator's motion for rehearing on June 19, 2019, and its mandate issued that day reinvesting Respondent with plenary jurisdiction in these cases.[20]

5. Nicole DeBorde's Unopposed Motion To Withdraw As an Attorney Pro Tem

On June 25, 2019, Nicole DeBorde filed her motion for leave to withdraw as an attorney pro tem.[21] Although DeBorde's *unopposed* motion has been pending for a year, and Relator has repeatedly asked Respondent to grant it, Respondent has failed to discharge his ministerial duty to rule on this *unopposed* motion within a reasonable amount of time.[22]

6. Relator's Motion for Respondent to Enter a Revised Order For Payment of Attorneys Fees as Ordered by the Mandate Of the Court of Criminal Appeals's Mandate

On July 17, 2019, Relator filed a "Motion for Ex Parte Determination

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it threatened to take legal action against Relator unless he promptly returned the fees paid to him for his professional services in these matters for 2015. Tab 21. After Relator retained counsel, the latter told Commissioners in no uncertain terms that Relator would not do so. Commissioners Court, like all schoolyard bullies who are challenged, slunk off and has not been heard from since. Tab 22.

[20] Tab 18.

[21] Tab 16.

[22] *See e.g., In re Ramos*, 598 S.W.3d 472, 473 (Tex.App.– Houston [14th Dist.] 2020, orig proc.)(trial court has a ministerial duty to rule on motions within a reasonable time after a party has requested a ruling); *see also In re Coffey*, 2018 WL 1627592 at *1-2 (Tex.App.– Houston [14th Dist.] April 5, 2018, orig. proc.)(not designated for publication)(granting mandamus relief to compel trial judge to rule on an opposed motion that had been pending for four months).

Regarding Issuance of a New Order for Payment,"[23] noting that the Court of Criminal Appeals's mandate required Respondent "to issue a new order of payment of fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure."[24] Paxton filed a reply on July 22, 2019.[25] Relator's motion has been pending for almost a year, but Respondent has not ruled on it even as Relator has repeatedly sought a ruling on it. Indeed, Respondent has declined to set this motion for a hearing in the face of Relator's repeated requests for him to do so.[26]

7. Paxton's Motion to Set Aside Change of Venue As Void and Return Venue to Collin County, Texas

On March 29, 2017, Judge Gallagher granted the State's motion to change venue.[27] On April 11, 2017, Judge Gallagher ordered that venue

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[23] Tab 19. Relator pointed out that a determination of attorneys fees is an exception to State Bar Disciplinary Rules prohibiting ex parte communications between a party and the trial court. *See Morrison v. State*, 575 S.W.3d 1, 17 (Tex.App.– Texarkana 2018, no pet.).

[24] *Id.* at 200.

[25] Tab 20.

[26] Tab 3 at 4-4; Tab 2 at 5-6.

[27] Tab 4.

be changed to Harris County, Texas.[28] On May 10, 2017, Paxton filed an "Objection to Rulings Made by Judge Sitting by Expired Assignment and Motion to Return Case to Presiding Judge of the 416th District Court" arguing for the first time that because Judge Gallagher's appointment order to preside over these matters had allegedly expired in January 2017, his order changing venue to Harris County in April 2017 was void."[29] On July 18, 2019, Paxton filed a motion to "Set Aside Change of Venue as Void and Return Cases to Collin County," re-urging his claim that Judge Gallagher's order changing venue in April 2017 was void.[30] Relator filed a response to Paxton's motion on September 13, 2019, arguing *inter alia*, that Paxton had waived this claim by failing to urge it as soon as the basis for it became apparent in January 2017.[31] On December 13, 2019, Paxton filed his "Reply to State's Motion to Return Venue to Collin County."[32]

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[28] Tab 5.

[29] Tab 6.

[30] Tab 10.

[31] Tab 11.

[32] Tab 12.

On December 17, 2019, Respondent conducted the *only* on-the-record hearing in the year since reacquiring plenary jurisdiction. Respondent stated off the record prior to the hearing that argument would be limited to Paxton's motion to "Set Aside Change of Venue as Void and Return Cases to Collin County, Texas."[33] At the end of this hearing, Respondent noted that he "[was] not going to make a ruling at this particular time [and was] going to probably rule on it sometime in January."[34] He recessed the matter until January 29, 2020 when he would allegedly rule.[35]

8. Respondent's Rulings

On June 25, 2020, five months after Respondent announced that he would "probably rule" on Paxton's motion to return venue to Collin County, Respondent granted Paxton's motion.[36] Respondent then declined Relator's renewed request to rule on DeBorde's unopposed motion to

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[33] Tab 13.

[34] Tab 13 at 24.

[35] Tab 13 at 24. After the hearing, Paxton filed his "Post-Hearing Memorandum to Correct Inaccurate [sic] Arguments by State" on January 7, 2020. Tab 14. On January 16, 2020, Relator filed his "Post-Hearing Reply to Paxton's Motion to Keep From Being Tried in Harris County. Tab 15.

[36] Tab 1.

withdraw and his motion that Respondent obey the mandate of the Court of Criminal Appeals to enter a revised payment order for attorneys fees.[37]

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a writ of mandamus against Respondent.[38] While this Court and the Court of Criminal Appeals have concurrent, original jurisdiction in this cause, absent a compelling reason not to do so, the petition should be presented first to this Court.[39]

ISSUES PRESENTED

1. Respondent abused his discretion granting the Real Party in Interest's motion to return venue to Collin County based on the alleged expiration of the trial judge's order of appointment.

2. Respondent failed to discharge his ministerial duty to obey the Court of Criminal Appeals's mandate to issue a new order for payment of attorneys fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure.

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[37] Tab 2 at 4-5. Relator argued without contradiction that he had repeatedly sought rulings on these motions from Respondent but he had repeatedly declined to do so. *See e.g., Parker v. State*, 462 S.W.3d 559, 568 n. 13 (Tex.App. – Houston [14th Dist.] 2015, no pet.)("This Court accepts as true factual assertions made by counsel which are not disputed by opposing counsel.").

[38] *See* Tex. Govt. Code, sec. 22.221(b)(1)("Each court of appeals for a court of appeals district may issue all writs of mandamus, agreeable to the principles of law regulating those writs, against a judge of a district ...court in the court of appeals district."); *see also* Tex. Govt. Code, sec. 22.021(o)(listing districts of First and Fourteenth Courts of Appeals as including Harris County within which judicial district Respondent sits as a district judge).

[39] *Padilla v. McDaniel*, 122 S.W.3d 805, 808 (Tex.Crim.App. 2003).

3. Respondent failed to discharge his ministerial duty to rule on Relator's motion for the issuance of a new payment order for attorneys fees and on Nicole DeBorde's unopposed motion to withdraw as an attorney pro tem within a reasonable period of time.

SUMMARY OF ENTITLEMENT TO RELIEF

1. Respondent abused his discretion granting the Real Party in Interest's motion to return venue to Collin County based on the trial judge's order of appointment allegedly having expired before he issued his ruling changing venue. Respondent's ruling is foreclosed by the law of the case doctrine because this issue was decided by the Dallas Court of Appeals in an earlier mandamus proceeding. Respondent's ruling is foreclosed by the facts that this claim was waived because the Real Party in Interest failed to voice a timely and specific objection and obtain a ruling as soon as the basis for this claim became apparent. Respondent's ruling ignores the fact that the trial judge – a sitting district judge and not a former or retired judge – was free to exchange benches with the judge of the 416th District Court of Collin County without regard to an order appointing him to do so. Because the three cases Respondent relied upon are either not binding or factually distinguishable, his ruling is "contrary to clearly controlling

legal principles." Because the law invoked by Relator in opposition to this ruling is "definite, unambiguous, and unquestionably applies to the indisputable facts of the case," Relator is entitled to mandamus relief setting aside Respondent's ruling.

2-3. Respondent failed to discharge his ministerial duty to rule on Relator's motion to issue a new payment order for payment of attorneys fees and on Nicole DeBorde's unopposed motion to withdraw as an attorney pro tem within a reasonable time. Respondent also failed to discharge his ministerial duty to carry out the Court of Criminal Appeals's mandate to "issue a new order for payment of fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure." Respondent's failure to rule on Relator's motion after it was pending for eleven months given Relator's repeated requests to do so was a clear violation of his ministerial duty to do so. Once he reacquired plenary jurisdiction, Respondent had a ministerial duty to carry out the Court of Criminal Appeals's mandate by "giving effect to its judgment" and "conducting any further proceedings necessary to dispose of the cause in a manner consistent with [its] opinion."

ARGUMENT AND AUTHORITIES

A. The Standard of Review for Obtaining Mandamus Relief

Relator is entitled to mandamus relief if can demonstrate that: (1) he has no other adequate legal remedy, and (2) the act he seeks to compel is purely ministerial.[40] The Court of Criminal Appeals has restated this standard to mean that Relator is entitled to mandamus relief if he can demonstrate that: (1) he has no adequate remedy at law, and (2) he has a clear and indisputable right to the relief sought.[41]

It is beyond dispute that Relator has no adequate remedy at law to appeal Respondent's order granting Paxton's motion to return venue to Collin County.[42] Respondent's ruling does not fall within any of the six enumerated scenarios vesting the State with the right to appeal.[43] Even if Relator has a remedy at law, no *adequate* remedy at law exists if it is

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[40] *In re McCann*, 422 S.W.3d 701, 704 (Tex.Crim.App. 2013).

[41] *In re State ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d at 194.

[42] *See State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 203 (Tex.Crim.App. 2003)(State had no right to appeal trial judge's ruling authorizing videotaping of jury deliberations in a capital murder case).

[43] *See* Texas Code Crim. Proc. art. 44.01(a)(1)-(6)(State has no right to appeal order of the trial court granting defendant's motion to return venue to originating county).

"so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective as to be deemed inadequate."[44]

The ministerial act requirement is satisfied where Relator shows a "clear right to the relief sought," *i.e.*, "the merits of the relief sought are beyond dispute."[45] This showing exists where the facts and circumstances dictate one rational decision "under unequivocal, well-settled (*i.e.*, from extant statutory, constitutional, or case law sources), and clearly controlling legal principles."[46] Judicial discretion[47] does not preclude mandamus "to compel a trial court to rule a certain way" on an issue that is "clear and indisputable" such that its merits are "beyond dispute."[48] It

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[44] *In re McCann*, 422 S.W.3d at 704.

[45] *Id.*; *In re Cook*, 597 S.W.3d 589, 596 (Tex.App.– Houston [14th Dist.] 2020, orig. proc.)

[46] *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex.Crim.App. 2013); *In re State*, ___ S.W.3d ___, ___ 2020 WL 1943033 at *2 (Tex.App.– Houston [1st Dist.] April 23, 2020, orig. proc.) (not yet reported); *In re Cook*, 597 S.W.3d at 596.

[47] It is axiomatic that the trial court lacks discretion to decide what the law is, applying the law to the facts, or to misinterpret the law. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). *See also Hebert v. State*, 836 S.W.2d 252, 255 (Tex.App.–Houston [1st Dist.] 1992, pet. ref'd)("Abuse of discretion does not imply intentional wrong or bad faith, or misconduct ... only an erroneous conclusion."); *United States v. Walker*, 772 F.2d 1172, 1176 n. 9 (5th Cir. 1985)("'Abuse of discretion' is a phrase which sounds worse than it is. The term does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge."

[48] *State ex rel. Rosenthal v. Poe*, 98 S.W.3d at 198 n. 3.

is proper for this Court to order a court to rule in a particular way if the law invoked by Relator is "definite, unambiguous, and unquestionably applies to the indisputable facts of the case."[49] An issue of first impression may qualify for mandamus relief if the factual scenario at issue has never been precisely addressed but the principle of law has been clearly established,[50] that is, when the principle of law is so plainly prescribed as to be free from doubt.[51]

B. Respondent's Ruling Returning Venue to Collin County is Contrary to Clearly Controlling Legal Principles

1. Because the Dallas Court of Appeals Held that Judge Gallagher's Authority to Act Terminated Only After He Changed Venue, His Ruling is Foreclosed by the Law of the Case Doctrine

As a threshold matter, Respondent's ruling is contrary to what the Dallas Court of Appeals made clear when it granted Paxton mandamus relief in May 2017:[52]

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[49] *In re Allen*, 462 S.W.3d 47, 50 (Tex.Crim.App. 2015).

[50] *State ex rel. Rosenthal v. Poe,* 98 S.W.3d at 126.

[51] *Id.* at 122.

[52] *In re Paxton*, 2017 WL 2334242 (Tex.App.– Dallas May 30, 2017, orig. proc.)(not designated for publication). Over the dissent of three judges, the Court of Criminal Appeals denied Relator's motion for leave to file his original application for writ of mandamus. *In re State of Texas*

- "[W]e agree with [Paxton] that [Judge Gallagher's] orders signed *after the transfer* [of venue] *order* are void..."[53]

- As a result of [Judge Gallagher's order transferring venue to Harris County on April 11, 2017] *jurisdiction over the cases vested in the Harris County district courts*, and the Collin County district court was divested of jurisdiction over the cases."[54]

- "We have already determined *that the signing of the transfer order vested jurisdiction in the Harris County District Courts* and divested the Collin County District Courts of jurisdiction over the cases."[55]

- "Jurisdiction over the cases vested immediately in the Harris County district courts *when* [Judge Gallagher] *signed the transfer order.*[56]

- "[Judge Gallagher's] *authority to act expired when the venue order became final. Consequently*, [his] *appointment also expired at that time.*"[57]

Although Relator repeatedly referred to these consequential findings on multiple occasions in urging Respondent to deny Paxton's motion, he

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v. Wice, 2017 WL 2472943 at *1 (Tex.Crim.App. June 7, 2017)(not designated for publication).

[53] *Id.* at *1. (emphasis added).

[54] *Id.* at *3. (emphasis added).

[55] *Id.* (emphasis added).

[56] *Id.* at * 4. (emphasis added).

[57] *Id.* at *5. (emphasis added).

did not acknowledge them.[58] Respondent's ruling ignores the principle that the law of the case doctrine prohibited him from revisiting the court of appeals's determination of this question of law at any other stage of this litigation.[59] This tenet mandates that "initial determinations of questions of law in a case are held to govern throughout subsequent stages of the litigation."[60] In turning a blind eye to this "well-settled (*i.e.*, from extant statutory, constitutional, or case law sources), and clearly controlling legal principle[ ]," [61] Respondent's ruling constituted an abuse of discretion.

2. *Respondent's Ruling Ignores Paxton's Forfeiture of this Claim By Failing to Voice a Timely Objection and Obtaining a Ruling on it as Soon as the Basis For It Became Apparent and Failing to Raise it in his Writ of Mandamus in the Court of Appeals*

Respondent's ruling is contrary to clearly controlling legal principles that almost all complaints can be forfeited by a failure to urge a timely

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[58] Tab 11 at 2-3; Tab 13 at 11.

[59] *Ex parte Schuessler*, 846 S.W.2d 850, 852 n. 7 (Tex.Crim.App. 1993).

[60] *Shields v. State*, 27 S.W.3d 267, 270 (Tex.App.– Austin 2000, no pet.); *see also State v. Swearingen*, 478 S.W.3d 716, 720 (Tex.Crim.App. 2015)(under law of the case, "when the facts and legal issues are virtually, they should be controlled by an appellate court's previous resolution").

[61] *In re State ex rel. Weeks*, 391 S.W.3d at 122.

specific objection and obtain a ruling thereon.[62] And, in this case, that is exactly what happened.

This record reveals that even after the basis for his objection became apparent or was subject to discovery with minimal, let alone, reasonable diligence during the first week of January 2017, Paxton continued to submit himself to the jurisdiction of the court, including conference calls on February 7, 2017; February 22, 2017; March 16, 2017; March 22, 2017; April 7, 2017; and April 10, 2017.[63] He also appeared for hearings before Judge Gallagher on February 16, 2017 and March 29, 2017 in Collin County on the venue issue, and in Harris County on April 20, 2017, at a planning and logistics meeting.[64] Paxton voiced no objection to Judge Gallagher's appointment allegedly having expired until May 10, 2017 and even then, Paxton did not address his complaint to Judge Gallagher as Rule 33.1(a) and controlling case law mandate, but rather to Regional

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[62] *See generally* Tex. R. App. P. 33.1; *Geuder v. State*, 115 S.W.3d 11, 13 (Tex.Crim.App. 2003)(complaining party must give the trial court a chance to rule on the objection by presenting the complaint to the trial court as soon as the basis for it becomes apparent).

[63] Tab 11 at 4.

[64] Tab 11 at 4.

Administrative Judge Mary Murphy, who directed Paxton to address his complaint to the court of appeals.[65] But there is another, equally compelling reason why Paxton forfeited this complaint.

When Paxton filed his petition for writ of mandamus seeking to vacate Judge Gallagher's orders entered after his order changing venue on April 11, 2017, Paxton never sought to vacate Judge Gallagher's ruling transferring venue.[66] Because Paxton only sought Judge Gallagher's removal and not the rescission of his order changing venue on the grounds later claimed, he has forfeited his claim, regardless of its lack of merit.[67]

While Paxton argued that he only discovered that Judge Gallagher's appointment order allegedly lapsed in May 2017,[68] an unavailing assertion Relator repeatedly controverted,[69] he provided no reason why he could not have discovered this in January, February, March, or April 2017 with the

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[65] Tab 8.

[66] *In re Paxton*, 2017 WL 2334242 at *1 ("[Paxton] asks this Court to issue a writ of mandamus vacating all orders signed by [Gallagher] following the April 11, 2017 transfer order.").

[67] *Geuder v. State*, 115 S.W.3d at 13.

[68] Tab 13 at 6,19.

[69] Tab 13 at 19-21. *See* also n. 38, *supra.*

exercise of reasonable diligence prior to participating in the hearing on the State's motion for change of venue in April 2017. In an analogous context, the Court of Criminal Appeals rejected the State's contention that it did not know the trial judge signed an order suppressing evidence triggering its 20-day deadline to file notice of appeal and resulting in its appeal being dismissed.[70] The court held that once the State was placed on constructive notice that the trial court granted the motion to suppress, it "could have exercised diligence to monitor the district clerk's record for the filing of a signed order from that point forward."[71] Because the State "exercised no such diligence," the court affirmed the dismissal of the State's appeal.[72] Because this requirement that a party exercise due diligence in learning of an event or fact that was readily discoverable with the exercise of such diligence applies with equal force to Judge Gallagher's allegedly lapsed appointment order, Respondent's order failing to acknowledge that Paxton forfeited this claim is obviously contrary to "unequivocal, well-settled (*i.e.*,

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[70] *State v. Wachtendorf*, 475 S.W.3d 895, 903 (Tex.Crim.App. 2015).

[71] *Id.*

[72] *Id.* at 904.

from extant statutory, constitutional, or case law sources), and clearly controlling legal principles."[73]

Paxton claimed he only learned of this fact "by happenstance after making a specific request seeking appointment documents to the regional administrative Judge..."[74] But Paxton presented *no evidence* to suggest he could not – whether by "happenstance" or by the exercise of reasonable diligence – have made this request in January, February, March or April before he gambled and lost that Judge Gallagher would deny the State's motion to change venue.[75] While Paxton argued he could not have waived this claim because waiver "is an intentional relinquishment of a known right,"[76] this submission erroneously conflates the standard driving the waiver of a constitutional right[77] with the forfeiture standard governing

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[73] *In re State ex rel. Weeks*, 391 S.W.3d at 122; *In re State*, ___ S.W.3d at ___, 2020 WL 1943033 at *2; *In re Cook*, 597 S.W.3d at 596.

[74] Tab 14 at 2.

[75] *See Guajardo v. State*, 109 S.W.3d 456, 460 (Tex.Crim.App. 2003)(defendant's burden to bring forward sufficient record to demonstrate he is entitled to relief); *see also United States v. Stockman*, 947 F.3d 253, 264 (5th Cir. 2020)("Stockman's time-and-space argument is weakened by the absence of evidence supporting it...")

[76] Tab 13 at 23.

[77] *See e.g., Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

the preservation of a complaint in the trial court.[78]

Moreover, Respondent failed to recognize the equally critical fact that Paxton's May 2017 mandamus petition sought only to remove Judge Gallagher and "vacate[ ] all orders signed by [him] following the April 11, 2017 order transferring venue."[79] It did not ask that venue be returned to Collin County because his appointment order had allegedly expired when this issue was ripe for resolution.[80] Paxton's deliberate decision not to raise this complaint while it was ripe for resolution in the court of appeals in May 207 is the antithesis "of the type of contemporaneous objection demanded by Texas Rule of Appellate Procedure 33.1."[81]

Simply put, Paxton received all of the relief, indeed, the *only* relief he sought from the court of appeals in May 2017 and it did not include the claim Respondent sustained. Respondent's ruling sanctioning Paxton's

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[78] *See n.* 63, *supra.*

[79] *In re Paxton*, 2017 WL 2334242 at *1.

[80] *Id.*

[81] *Fisher v. State*, 357 S.W.3d 115, 117 (Tex.App.– Amarillo 2011, pet.ref'd)(defendant waived his claim under the Interstate Agreement on Detainers Act by not raising it until his second trial even though 120 days expired before the first proceedings began).

gamesmanship in laying behind the log to obtain the relief he declined to seek at the time required by the Rules of Appellate Procedure is a clear abuse of discretion warranting mandamus relief. Having prevailed on his conscious election to seek limited relief of "vacating all orders signed by [Judge Gallagher] following [his] ... order changing venue,"[82] and not the rescission of the transfer order because it was void, Paxton received all the relief that he sought. Accordingly, basic principles of error preservation buttress the conclusion that Paxton forfeited this claim.[83] Because this unbroken line of precedent Relator relies upon fortifies the notion that his right to vacate Respondent's ruling is "clear and indisputable" and its merits "beyond dispute," this Court should grant mandamus relief.[84]

3. Judge Gallagher Could Exchange Benches and Preside Over the 416th District Court of Collin County Without an Appointment Order

Even if Paxton preserved his claim Judge Gallagher's appointment

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[82] *Id.*

[83] *See e.g., Hernandez v. State*, 538 S.W.3d 619, 623 (Tex.Crim.App. 2018)(having received all of the relief that he requested after his objection to improper jury argument was sustained and his motion for mistrial was granted, defendant waived his right to seek by a mistrial by not requesting one after his request for an instruction to disregard was granted).

[84] *In re State ex rel. Weeks*, 391 S.W.3d at 122; *In re State*, ___ S.W.3d at ___, 2020 WL 1943033 at *2; *In re Cook*, 597 S.W.3d at 596.

order expired in January 2017, Respondent's ruling is still a clear abuse of discretion. Respondent's ruling ignores the longstanding legal axiom that Judge Gallagher, as a sitting district judge in the 396th District Court of Tarrant County, was free to exchange benches with any district judge in Texas at any time and for any reason given the Texas Constitution's pronouncement that, "[T]he District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law."[85]

In December 2015, Judges David Evans and Mary Murphy, Regional Administrative Judges of the Eighth and First Administrative Judicial Regions respectively, issued a statutorily-permitted order for Judge Gallagher to preside over Paxton's cases through January 1, 2017.[86] During this period, Art. V, § 11 *required* him to preside over these cases in the 416th District Court of Collin County. After this period, however, Judge Gallagher was free to exchange benches and preside over the 416th District Court "when ... [he] deem[ed] it expedient." In other words,

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[85] Tex. Const. art V, sec. 11.

[86] Tab 7.

because Judge Gallagher was a sitting district judge free to exchange benches at will, the assignment order that animated Respondent's ruling controlled only when Judge Gallagher was *required* to preside over the 416th District Court. As a matter of constitutional law, and contrary to Respondent's ruling, Judge Gallagher was *authorized* to preside over the 416th District Court at any time without the need for any order of assignment, a well settled principle of law ignored by Respondent but long recognized by the Court of Criminal Appeals:

- "It is not necessary that a formal order be entered for the judge of one district court to preside over a case in place of a duly elected judge, nor is it necessary for the docket sheet or minutes to show the exchange of benches by district judges."[87]

- "Appellant questions the validity of the judgment because there is nothing in the record to show by what authority Judge McDonald presided in the District Court of Walker County, of which Honorable Max M. Rogers was and is the duly elected and qualified judge. ... Judge McDonald being at the time the regularly elected judge of the 66th Judicial District of this State, and not a 'special judge,' was authorized to preside for Judge Rogers without the necessity of the entry of a formal order."[88]

Respondent's ruling that Judge Gallagher's authority to hear this

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[87] *Davila v. State*, 651 S.W.2d 797, 799 (Tex.Crim.App. 1983).

[88] *Isaac v. State*, 257 S.W.2d 436, 437 (Tex.Crim.App. 1953)

case expired in January 2017 is not only foreclosed by the mandate in art. V, sec. 11 of the Texas Constitution and the holdings in *Davila* and *Isaac*, it is also foreclosed by *In re Richardson*.[89] In *Richardson*, the senior judge of the 196th District Court was assigned to the 202nd District Court for:

> [T]he period of 1 days [sic] beginning 2/28/07, providing that the assignment shall continue after the specified period of time as may be necessary for the assigned Judge to complete trial of any case or cases begun during this period, and to pass on motions for new trial and all other matters growing out of cases tried by the Judge herein assigned during this period, or the undersigned presiding judge has terminated this assignment in writing, whichever occurs first.
>
> CONDITION(S) OF ASSIGNMENT [IF ANY]:
>
> To hear Cause No. 99C985-202; *Southwest Construction Receivables, Ltd, et al v. Regions Bank*.[90]

Judge Gallagher's appointment order, which substantially mirrors the appointment order in *Richardson*, assigned Judge Gallagher, of the 396th District Court was assigned to the 416th District Court for:

> [T]he cause(s) and style(s) as stated in the conditions of assignment from this date until plenary power has expired or the undersigned Presiding Judge has terminated this

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[89] 252 S.W.3d 822, 829-30 (Tex.App. – Texarkana 2008, orig. proc).

[90] *Id.* at 825.

assignment in writing, which ever occurs first.

CONDITION(S) OF ASSIGNMENT

NOS. 416-81913-2015, 416-81914-2015, 416-81915-2015; State of Texas V. Warren Kenneth Paxton, Jr.[91]

The court in *Richardson* rejected the argument that the face of the appointment order revealed that the visiting judge's authority to preside had expired after one day, opining that doing so "would render the order virtually nonsensical and incapable of the use for which it was intended."[92] The court went on to conclude that the appointment order gave the senior judge "authority to hear the named case on the merits" because:

> [W]e are bound to read the assignment order as a whole and must keep in mind that form should not prevail over substance. To read the order as [relator] suggests, we would have to ignore the conditions of the assignment: "To hear Cause No. 99C985-202; *Southwest Construction Receivables, Ltd, et al v. Regions Bank*." Since we must consider the order as a whole, we simply cannot ignore that language. ...
>
> *The most reasonable reading of the substance of this order within the context in which it was issued is that Judge Banner was assigned to hear this case when Judge Pesek recused himself.* By reconciling the language in the order taken as a

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[91] Tab 7 Exhibit B.

[92] *In re Richardson*, 252 S.W.3d at 830.

> whole and considering the context in which the order was issued, we conclude that Judge Banner has authority, pursuant to Judge Ovard's assignment order, to hear the underlying cause on the merits.[93]

Viewed through this lens, as in *Richardson*, "The most reasonable reading of the substance of [Judge Murphy's] order within the context in which it was issued is that [Judge Gallagher] was assigned to hear this case when [Judge Oldner] recused himself."[94] As in *Richardson*, where the court found "the context in which the [appointment] order was issued" to be of paramount importance to its determination that the order invested the visiting judge with authority to hear the case, the context of the order issued in this case compels the identical result. Judge David Evans's order assigning Judge Gallagher to the Eighth Administrative Region for 366 days to hear the Paxton prosecution was signed on December 21, 2015.[95] By that time, Paxton had filed four pre-trial writs of habeas corpus and a series of other pre-trial motions that Judge Gallagher denied on December

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[93] *Id.* at 830-31. (citation omitted)(emphasis added).

[94] *Id.*

[95] Tab 7 Exhibit D.

12, 2015.[96] Given Paxton's unsuccessful attempts at obtaining a reversal of Judge Gallagher's rulings in the court of appeals and the Court of Criminal Appeals,[97] a process that was not over until mid-October 2016, and given the unrelenting attempts early on in this matter by Paxton, his friend Jeff Blackard, and Commissioners Court to deny Relators attorneys fees,[98] a quest continuing to this day, it was altogether improbable that this case would be disposed of by January 2, 2017 when Judge Gallagher's appointment allegedly lapsed. Because Respondent's ruling is driven by his impermissible elevation of form over substance in interpreting Judge Gallagher's appointment order, and his failure to recognize the context within which the order was issued, the two factors in *Richardson* that animated the rejection of the challenge to the validity of the order, it is "contrary to clearly controlling legal principles."[99]

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[96] Tab 27.

[97] *Ex parte Paxton*, 493 S.W.3d 292, 307-08 (Tex.App.– Dallas, pet. ref'd).

[98] *In re State of Texas ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d at 203 (Richardson, J., *concurring*).

[99] *In re State ex rel. Weeks*, 391 S.W.3d at 122; *In re State*, ___ S.W.3d at ___, 2020 WL 1943033 at *2; *In re Cook*, 597 S.W.3d at 596.

4. The Three Cases Respondent Relied On in Support of his Ruling Are Either Not Binding or Factually Distinguishable

Finally, but perhaps most importantly, the three cases Respondent relied upon[100] to support his ruling simply do not do so. In *B.F.B.*[101] the judge whose appointment was challenged was *senior* judge Paul Banner;[102] in *Wilson*,[103] *former* judge Bob Burdette; and in *Eastland*,[104] *former* court of appeals justice Clyde Ashworth.[105] Respondent's reliance on *Eastland* and *B.F.B.* for the proposition that Judge Gallagher's appointment order was void is clearly erroneous as both are civil cases with absolutely no precedential value in a criminal proceeding.[106] Notably, while Respondent

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[100] Respondent relied on *In re B.F.B.*, 241 S.W.3d 643 (Tex.App.–Texarkana 2007, no pet.), *Wilson v. State*, 977 S.W.2d 379 (Tex.Crim.App. 1998), and *In re Eastland*, 811 S.W.2d 571 (Tex. 1991)(orig. proc.)(per curiam). Tab 2 at 3-4.

[101] *Id.* at 645.

[102] *Id.*

[103] *Wilson v. State*, 977 S.W.2d at 380.

[104] *In re Eastland*, 811 S.W.2d at 572.

[105] At the time of his 1988 appointment, Ashworth was a senior district judge following his retirement from the court of appeals. www.dallasnews.com, "Judge Clyde Ashworth, wounded in 1992 Fort Worth courtroom shooting, dies at 87," April 1, 2010 (last visited June 23, 2020).

[106] Respondent's reliance on *Eastland* and *B.F.B.* in support of his ruling is a clear abuse of judicial discretion. Under Art. V. sec. 5 of the Texas Constitution, "the Court of Criminal Appeals shall have final appellate jurisdiction coextensive with the limits of the state, and its determination

relied upon *B.F.B.*, he failed to recognize that the court of appeals cited *Wilson* – one of the cases Respondent relied upon – for the game-changing tenet that, "The Texas Court of Criminal Appeals requires an objection to a procedural irregularity when the judge is otherwise qualified."[107]

Like the MacGuffin[108] in a Hitchcock movie, Respondent may have felt Judge Gallagher's appointment order was necessary to his ruling but in reality, it played no part in the plot line driving his clearly erroneous order. The cases Respondent relied upon to support his decision lacked precedential value and are not binding or are factually apposite. The facts and circumstances set out above compelled Respondent to make one and only one rational decision "under unequivocal, well-settled ... and clearly controlling legal principles"[109] – denying Paxton's motion. Because this

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shall be final in all criminal cases of whatever grade..." Respondent's reliance on these *civil* cases is contrary to unequivocal, well-settled, and clearly controlling legal principles. While Relator made this same argument to Respondent in December 2019, Tab 13 at 8, it apparently fell on deaf ears.

[107] *In re B.F.B.*, 241 S.W.3d at 646.

[108] "A MacGuffin is an object, device, or event that is necessary to the plot and the motivation of the characters, but insignificant, unimportant, or irrelevant in itself." www.wikipedia.com (last visited June 23, 2020).

[109] *In re State ex rel. Weeks*, 391 S.W.3d at 122.

issue's resolution is "clear and indisputable" and "beyond dispute,"[110] controlling case law entitled Relator to mandamus relief.

C. Respondent's Ministerial Duty to Rule on Motions Within a Reasonable Period of Time

If a party properly files a motion with the trial court, the trial court has a ministerial duty to rule on the motion within a reasonable time after the motion has been submitted to the trial court for a ruling or a party has requested a ruling.[111] Thereafter, if the trial court fails to rule, mandamus may issue to compel the trial court to act.[112] What constitutes a reasonable time depends on the facts and circumstances of the particular case.[113] For those reasons that follow, Respondent's failure to discharge his ministerial duty to rule on Relator's motion to "issue a new order for payment of fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure" as commanded by the mandate of the Court of Criminal Appeals entitles Relator to mandamus relief.

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[110] *State ex rel. Rosenthal v. Poe*, 98 S.W.3d at 198 n. 3

[111] *In re Ramos*, 598 S.W.3d at 473.

[112] *Id.*

[113] *In re Salazar*, 134 S.W.3d 357, 358 (Tex.App.– Waco 2003, orig. proc.).

D. Respondent's Eleven-Month Delay In Not Ruling On Relator's Motions Is Unreasonable

Relator's motion was filed on July 17, 2019, Paxton's response was filed July 22, 2019, this motion was at issue for *over eleven months*, and Relator requested rulings on several occasions.[114] Clearly controlling case law from this Court and its sister Court that delays of four,[115] six,[116] eight,[117] and ten months[118] in failing to rule on a pending motion are unreasonable buttresses the belief that Respondent's eleven-month delay

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[114] *See* n. 38, *supra.*

[115] *In re Coffey*, 2018 WL 1627592 at *2 (failure to rule on unopposed motion pending over four months was unreasonable). *Coffey* makes it clear that this Court must compel Respondent to rule on DeBorde's *unopposed* motion to withdraw that has been pending for over a year.

[116] *In re Harris Cty. Appraisal Dist.*, 2019 WL 1716274 at *3-4 (Tex.App.– Houston [14th Dist.] April 18, 2019, orig. proc.)(failure to rule on motion pending for six months was unreasonable); *see also In re Schmotzer*, 2020 WL 582235 at *1 (Tex.App.– Waco February 5, 2020, orig. proc.)(not designated for publication)("Neither the Respondent nor the Real-Party-in-Interest has responded to explain why the Respondent needs more than six months to rule on the motion.").

[117] *In re ABC Assembly LLC*, 2019 WL 2517865 at *2 (Tex.App.– Houston [14th Dist.] June 18, 2019, orig. proc.)(not designated for publication)(failure to rule on motion pending for eight months was unreasonable); *In re PDVSA Servs., Inc.*, 2017 WL 6459227 at *4 (Tex.App.– Houston [14th Dist.] December 19, 2017, orig. proc.)(not designated for publication)(same); *In re Ramos*, 598 S.W.3d at 475 (same).

[118] *In re Baylor College of Medicine*, 2019 WL 3418504 at *4 (Tex.App.– Houston [1st Dist.] July 30, 2019, orig. proc.)(not designated for publication)("We conclude, under these circumstances where the motions are opposed, but have been pending over ten months, and the respondent noted at the hearing that they appeared straightforward and would be granted within a week, and it appears the delay in ruling is prejudicing relators, that the respondent has abused her discretion.").

is unreasonable. This notion finds support in a case from the El Paso Court of Appeals involving "complicated issues, a lengthy trial record, and over 1,000 pages of post-verdict briefing," where the trial court's failure to rule in eight months was unreasonable.[119] By contrast, Relator's motion asking Respondent to honor the Court of Criminal Appeals's mandate is not complicated and involves far less briefing than a thousand-plus pages.

Relator is not unaware that COVID-19 has changed in myriad ways how courts at every level operate. Indeed, it is no coincidence Respondent sought to explain his delay in ruling on Paxton's motion to return venue to Collin County on this basis.[120] But, if it is true, as the Supreme Court of Texas has recently noted, that "The Constitution is not suspended when the government declares a state of disaster,"[121] neither is Respondent's

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[119] *In re Mesa Petroleum Partners, LP*, 538 S.W.3d 153, 158 (Tex.App.–El Paso 2017, orig. proc.).

[120] Tab 3 at 9. Tellingly, Respondent never bothered to explain why he had failed to rule on Relator's motion to issue a new payment order for attorneys fees even though he reacquired plenary jurisdiction almost a year ago and had a ministerial duty to carry out the Court of Criminal Appeals's mandate in this regard. Moreover, Respondent has never articulated any reason why he has not ruled on Nicole DeBorde's *unopposed* motion to withdraw that has been pending for over a year.

[121] *In re Abbott*, ___ S.W.3d ___, ___ 2020 WL 1943226 at *1 (Tex. April 23, 2020, orig. proc.)(not yet reported).

ministerial duty to rule on pending motions within a reasonable time.[122]

E. Respondent Has Failed to Discharge his Ministerial Duty to Obey The Court of Criminal Appeals's Mandate to Issue a New Order for Payment of Attorneys Fees Complying With Art. 26.05(c)

Relator is also entitled to have this Court compel Respondent to rule on his motion to issue an amended order for his attorneys fees because he had a ministerial duty to obey the Court of Criminal Appeals's mandate ordering it.[123] Mandamus will issue "where upon receipt of this Court's mandate, a trial judge fails to follow the explicit directions of this Court."[124] "The inadequate remedy at law requirement is met because a [party] has no adequate method for appealing from a trial court's failure to follow the mandate of this Court."[125] The ministerial duty requirement

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[122] This Court can take judicial notice that, even in the midst of a pandemic that required it to hear arguments via Zoom, the Texas Supreme Court issued a series of opinions in a case involving complicated legal issues holding that a fear of contracting COVID-19 at a polling place did not constitute a "disability" permitting a citizen to vote by mail just *one week* after argument. *In re State of Texas*, ___ S.W.3d ___, 2020 WL 2759629 (Tex. May 27, 2020, orig. proc.)(not yet reported).

[123] *In re State of Texas ex rel. Wice v. Fifth Judicial District Court of Appeals*, 581 S.W.3d at 200 (ordering Respondent to "issue a new order for payment of [attorneys] fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure.").

[124] *Berry v. Hughes*, 710 S.W.2d 600, 601-02 (Tex.Crim.App. 1986)(orig. proc.)(per curiam) ("The Court of Criminal Appeals is the court of last resort in this state in criminal matters. This being so, no other court of this state has authority to overrule or circumvent its mandates.").

[125] *Id.*

is met because an appellate court's mandate imposes a ministerial, non-discretionary duty on the trial court to enforce its judgment.[126] Once Respondent required plenary jurisdiction, the mandate imposed "a mandatory, ministerial duty" upon him to "give effect to its judgment" and "conduct any further proceedings necessary to dispose of the cause in a manner consistent with [its] opinion."[127] Respondent had "no discretion to review, interpret, or enforce the mandate, but, instead, must carry out the mandate."[128] Because Respondent has not complied with his mandatory, ministerial duty to carry out the Court of Criminal Appeals's mandate in the eleven months since reacquiring plenary jurisdiction,

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[126] *See Tex. Health & Human Servs. Comm'n v. El Paso Cty. Hosp. Dist.*, 351 S.W.3d 460, 472 (Tex.App.— Austin 2011), aff'd, 400 S.W.3d 72 (Tex. 2013); *In re Evans,* 581 S.W.3d 431, 433 (Tex.App.– Texarkana 2019, orig. proc.).

[127] *Texas Dept. of Parks & Wildlife v. Dearing*, 240 S.W.3d 330, 347 (Tex.App.– Austin 2007, pet. den'd).

[128] *In re Henry*, 388 S.W.3d 719, 726 (Tex.App.– Houston [1st Dist.] 2012, orig. proc.). Relator recognizes that he has argued that it is legally impossible for Respondent to comply with the Court of Criminal Appeals's mandate if, in doing so, Respondent utilized the 2016 Collin County fee schedule that would pay Relator $3.13 an hour for all of his pre-trial work performed in 2016, a patently unreasonable fee that would not comply with Tex. Code Crim. Proc. 26.05(c). Tab 23 at 8 n. 9. But given the unique procedural posture of this proceeding, Relator is now compelled to agree with Paxton's argument that Relator's motion to declare this provision unconstitutional as applied to him is "premature" because Respondent "has not issued a second fee order..." Tab 24. Relator would, of course, be able to renew his motion if Respondent insisted on crafting a revised payment order that paid him $3.13 an hour.

Relator is entitled to have this Court compel Respondent to do so.[129]

PRAYER FOR RELIEF

Relator asks this Honorable Court to grant a stay, set this matter for oral argument, and issue a writ of mandamus commanding Respondent to discharge his ministerial duties to: (1) vacate his order of June 25, 2020 granting Paxton's motion to return venue to Collin County; (2) obey the Court of Criminal Appeals's mandate to issue a new payment order based on a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure; and (3) grant Nicole DeBorde's unopposed motion to withdraw as an attorney pro tem in these proceedings.

RESPECTFULLY SUBMITTED,

/s/ BRIAN W. WICE

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[129] *Berry v. Hughes*, 710 S.W.2d at 601-02. Relator recognizes that because this Court does not have jurisdiction to direct Respondent to order a particular payment as part of his ministerial duty to issue a order for payment of attorneys fees, *In re Ramos*, 598 S.W.3d at 474, Respondent will be tasked with making this determination in the first instance upon remand.

CERTIFICATE OF SERVICE AND REDACTION

Pursuant to Tex. R. App. P. 9.5(d), I certify this petition was served on all counsel of record and Respondent via electronic filing on June 30, 2020. I also certify I have made any necessary redactions in accordance with the Orders of the Texas Supreme Court and none were necessary.

/s/ BRIAN W. WICE

BRIAN W. WICE

TEX. R. APP. P. 52.3(J) CERTIFICATION

I have reviewed Relator's Petition for Writ of Mandamus and certify that every factual statement in it is supported by competent evidence in the appendix or in the record.

/s/ BRIAN W. WICE

BRIAN W. WICE

CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(1)(i)(1), I certify that this document complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(D):

Exclusive of the exempted portions in Tex. R. App. P. 9.4(i)(1), this document contains 6,294 words, and was prepared in proportionally spaced typeface using Word Perfect 8.0 in Century 14 for text and Times New Roman 12 for footnotes.

/s/ BRIAN W. WICE

BRIAN W. WICE

AFFIDAVIT REGARDING APPENDIX
PURSUANT TO TEX. RR. APP. P. 52.3(K) & 52.7(A)

STATE OF TEXAS §
COUNTY OF HARRIS §

Before me, the undersigned authority, on this day personally appeared Brian W. Wice, the affiant, a person whose identity is known to me, who under oath, testified as follows:

1. "My name is Brian W. Wice. I am a Collin County Criminal District Attorney Pro Tem and Lead Counsel for Relator, the State of Texas, in this mandamus proceeding. I am over 21 years of age, of sound mind, and competent to make this Affidavit. I have personal knowledge of the facts in this Affidavit, all of which are true and correct. I make this Affidavit on behalf of Relator, the State of Texas, in support of Relator's Petition for Writ of Mandamus.

2. "Relator's Petition is supported by an Appendix containing documents that are part of this record by other materials of which this Court may take judicial notice pursuant to Tex. R. App. P. 201(b)(2) & (f).

3. "In compliance with Tex. R. App. P. 52.3(k) and 52.7(a), I attest that the materials contained in Relator's Petition and Appendix are true and correct copies of those documents noted in Paragraph 2 of this Affidavit."

/s/ BRIAN W. WICE

BRIAN W. WICE

SWORN TO AND SUBSCRIBED before me on this the 30th day of June, 2020.

KIMBERLY FISHER
Notary Public, State of Texas
Comm. Expires 08-31-2020
Notary ID 10170352

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

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